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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 Jade Wilcox, on behalf of herself and) Case No. 2:17-cv-275-RMP
10 all others similarly situated,)
11 Plaintiffs,) Related to Case No. 2:17-cv-122-
12 v.) RMP
13 Swapp Law, PLLC, d/b/a Craig)
14 Swapp and Associates, and James) **PLAINTIFF'S UNOPPOSED**
15 Craig Swapp, individually,) **MOTION FOR PRELIMINARY**
16 Defendants) **APPROVAL OF CLASS ACTION**
17) **SETTLEMENT**
18) 11/25/2019
19) With Oral Argument: 1:30 p.m.
20) 920 West Riverside Ave., Rm. 901
21) Spokane, Washington
22)
23)

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Plaintiff's Motion for Preliminary Approval of Class Action Settlement - vi

INDEX OF EXHIBITS

Declaration of R. Joseph Barton with the following attachments:

Exhibit A Settlement Agreement;

Exhibit B Proposed Class Notice; and

Exhibit C Plan of Allocation.

Declaration of Colin M. Downes with the following attachments:

Exhibit A Proposal for Settlement Administration Services Submitted by Angeion Group; and

Exhibit B Proposal for Settlement Administration Services Submitted by RG/2 Claims Administration.

1 Plaintiff Jade Wilcox moves this Court to enter an order under Rule 23 of
2 the Federal Rules of Civil Procedure:

3 1. Preliminarily approving the Settlement Agreement between Plaintiff
4 and Defendants (attached as Exhibit A) as fair, reasonable, and adequate under
5 Rule 23(e) of the Federal Rules of Civil Procedure;

6 2. Approving the proposed Class Settlement Notice (attached as Exhibit
7 B) as to form and content and the plan for dissemination of notice to the Class as
8 satisfying the requirements of Rule 23(c)(2) and (e)(1) and appointing the
9 Settlement Administrator;

10 3. Approving the proposed Plan of Allocation; and

11 4. Setting dates and deadlines under Rule 23(d) and (e) of the Federal
12 Rules of Civil Procedure in order for the Court to evaluate whether the settlement
13 should be given final approval (after distribution of the proposed class notices to
14 the Class and submission of any objections to or requests for exclusion from the
15 settlement, and for a fairness hearing on final approval of the settlement), to
16 evaluate Class Counsel's request for an award of attorneys' fees and
17 reimbursement of costs and expenses and Plaintiff's request for a service award as
18 follows:

Deadline for Settlement Administrator to provide notice to the Class	30 days after the Preliminary Approval Date
Deadline for Class Counsel to file	14 days before deadline for date for

21 Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 1

1	motion for award of attorneys' fees and costs for Service Award for Class Representative	objections or exclusions
2	Last day for requests for exclusion from the Class to be submitted by Class Members	90 days after the Preliminary Approval Date
3	Last day for Class Members to file objections to the Settlement	90 days after the Preliminary Approval Date
4	Last day for Class Counsel to file Motion for Final Approval of Settlement	105 days after the Preliminary Approval Date
5	Hearing on motion for final approval of settlement and application for attorneys' fees and costs	At least 120 days after the Preliminary Approval Date

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Jade Wilcox respectfully submits this Memorandum in support of her motion to preliminarily approve the proposed Class Action Settlement with Defendants pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to approve the proposed notice to the Class, and to set various dates related to the approval of the Settlement.

Pursuant to the Settlement, Defendants have agreed, to (1) pay \$2 million, (2) cease making use of the personal information of the Class, (3) destroy any records containing personal information of the Class obtained from police traffic collision reports (“PCTRs”), (4) cease purchasing police traffic collision reports in or from the state of Washington for the purpose of acquiring contact information for potential clients, (5) identify any third parties to whom they provided any records containing the personal information of Class Members, and (6) advise any Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 2

1 such third parties that Plaintiff and the Class consider those records to contain
2 information protected by the DPPA. Given the uncertainty of establishing both
3 liability and damages, the risk on appeal, and uncertainty regarding the ability of
4 Defendants to satisfy a judgment reached at trial, the Settlement should be
5 preliminarily approved by the Court.

6 **I. History and Status of the Case**

7 **A. Statement of Facts**

8 In the State of Washington, law enforcement officers use standard PTCRs to
9 document vehicle accidents. ECF No. 62-2 at 8:9-16; ECF No. 61-2 at 23:5-8. In
10 collecting information for the PTCR, officers are trained to and do ask drivers for
11 their licenses, registrations, and insurance information and then ask if the
12 information on the registration and drivers' licenses is current. ECF No. 61-3 at
13 13:15-21; ECF No. 61-4 at 41:2-9; Declaration of Pete Cozzitorto ¶ 3, *Wilcox v.*
14 *Batiste*, No. 17-cv-00122-RMP (E.D. Wash.). If the information is current, officers
15 scan the barcode on a license or registration and if the barcode is scannable, a
16 software application—SECTOR—auto-populates the PTCR with information from
17 those documents, including the names and addresses of the driver. ECF No. 61-3 at
18 13:13-25; ECF No. 61-4 at 42:18-43:8; Declaration of Pete Cozzitorto ¶ 4, *Wilcox*
19 *v. Batiste*, No. 17-cv-00122-RMP (E.D. Wash.). If the barcode is not scannable,
20 officers manually enter the information from the license or registration (whichever

1 is current). ECF No. 61-8 at 17-18.

2 Once officers complete their PTCRs, SECTOR transmits the PTCRs to the
3 Department of Transportation and to the Washington State Patrol (“WSP”). ECF
4 No. 61-3 at 37:9-38:2; ECF No. 62-2 at 13:13-17. WSP’s Collision Records
5 Section maintains all PTCRs for the State of Washington, regardless of whether
6 they were prepared by WSP troopers, or local law enforcement. ECF No. 62-2 at
7 8:9-16. At least prior to June 9, 2017, the WSP routinely sold PTCRs – containing
8 drivers’ names and addresses – to anyone who wished to buy them through the
9 WSP website. ECF No. 62-2 at 25:21-26:22; *see Wilcox v. Bastiste*, No.17 CV 122,
10 2017 WL 2525309 at *4 (E.D. Wash. June 9, 2017).

11 Defendants, a personal injury attorney and his law firm, purchased 10,555
12 PTCRs between September 1, 2017 and June 23, 2017, of which 8,835 involved
13 individuals who were not then – and never became – clients of Swapp Law. ECF
14 No. 61-7 at Nos. 2(a), (b) and (c). Two of these PCTRs contained the personal
15 information of Plaintiff, who was involved in car accidents in 2015 and 2016. After
16 her 2016 accident, Ms. Wilcox received a letter from Defendants that offered their
17 legal services and stated they learned “from Washington public records” that she
18 was “involved in a serious accident on July 9.” ECF No. 62-1 at 1. The letter also
19 enclosed a booklet advertising Defendants’ firm. *Id.* Ms. Wilcox considered the
20 way “they got my address” to be “an invasion of [her] privacy.” ECF No. 62-3 at

1 94:19-24.

2 **B. The Claim and Relief Requested**

3 The Complaint alleges a single claim under the Driver's Privacy Protection
4 Act, 18 U.S.C. § 2721, *et seq.* Am. Compl. ¶¶ 6.1-6.11. The DPPA makes it
5 "unlawful for any person knowingly to obtain or disclose personal information,
6 from a motor vehicle record, for any use not permitted under Section 2721(b)" of
7 the DPPA. 18 U.S.C. § 2722(a). The DPPA defines personal information to mean
8 "information that identifies an individual, including an individual's photograph,
9 social security number, driver identification number, name, [and] address...." 18
10 U.S.C. § 2725. A "motor vehicle record" is defined as "any record that pertains to
11 a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or
12 identification card issued by a department of motor vehicles." *Id.* Because PTCRs
13 contain information identifying individuals, including names and addresses, and
14 this information is from the motor vehicle records used by police to prepare
15 PTCRs, the PTCRs obtained by Defendants contained personal information of
16 Class Members under the DPPA. The marketing of legal services is not a
17 "permissible use" of personal information under the DPPA. 18 U.S.C. § 2721(b);
18 *see Maracich v. Spears*, 570 U.S. 48, 61, (2013) (holding bulk attorney solicitation
19 of clients not a proper purpose under 18 U.S.C. § 2721(b)(4)). Thus, Defendants
20 undisputedly had no permissible purpose, within the meaning of 18 U.S.C. §

1 2722(a) or § 2721(b), to obtain the personal information of Plaintiff or the Class.

2 The Complaint requested relief on behalf of Plaintiff and a Class of other
3 drivers whose personal information was illegally obtained or used by Defendants
4 consisting of declaratory and injunctive relief aimed at preventing and restraining
5 Defendants' practice of illegally obtaining PCTRs, an injunction preventing and
6 restraining Defendants from disclosing or using the DPPA-protected information in
7 their possession, an injunction requiring Defendants to destroy such information,
8 an injunction requiring Defendants to identify under oath how and to who such
9 information was disclosed, and monetary damages in the amount of the statutorily
10 provided liquidated damages of \$2500 for each violation of the DPPA under 18
11 U.S.C. 2724(b)(1). Am Compl. at Prayer for Relief ¶¶ A-I.

12 **C. Procedural History**

13 The original complaint was filed on August 9, 2017. ECF No. 1. Defendants
14 responded by filing a motion to dismiss under Rule 12(b)(6) of the Federal Rules
15 of Civil Procedure, which the Court denied, ECF No. 21. Defendants then
16 answered the Complaint and asserted 14 defenses. ECF No. 22. Class Counsel
17 issued 24 interrogatories and 33 documents requests to Defendants, and reviewed
18 thousands of pages produced by Defendants and non-parties in discovery. Barton
19 Decl. ¶ 3. Class Counsel took depositions under Rule 30(b)(6) of the Washington
20 Department of Licensing, the Washington State Patrol, the Washington State
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1 Criminal Justice Training Commission, and the Spokane Police Department.
2 Barton Decl. ¶ 5. Class Counsel also defended Defendants' deposition of Plaintiff.
3 *Id.* Class Counsel filed two motions to compel seeking responses to interrogatories,
4 which were granted in part. Barton Decl. ¶ 3; ECF Nos. 65 & 79. Class Counsel
5 also successfully opposed Defendants motion to compel discovery from one of
6 Plaintiffs' counsel. Barton Decl. ¶ 4; ECF Nos. 75, 84, 106.

7 Based on information obtained in discovery, Plaintiff filed an Amended
8 Complaint that added to the factual allegations, but did not add any new legal
9 claim. ECF No. 69. Defendants moved to dismiss the Amended Complaint, which
10 the Court denied. ECF Nos. 80, 108. After extensive discovery, Plaintiff moved for
11 Class Certification of the Class, which the Court granted. ECF Nos. 61 & 109. The
12 Class certified by the Court is defined as:

13 All drivers identified in Police Traffic Collision Reports whose
14 Personal Information, as defined by the DPPA, was derived from a
15 Department of Licensing record (e.g. license, registration or database)
16 and the Report was obtained or used by the Swapp Law Firm (d/b/a
17 Craig Swapp & Associates) or Mr. Swapp from the Washington State
18 Patrol between September 1, 2013 and June 23, 2017.

19 Excluded from the Class are (a) current and former clients of
20 Defendants; (b) individuals identified on the same PTCRs as
Defendants' clients; (c) individuals who provided written consent to
Defendants for the disclosure of their Personal Information (as defined
by the DPPA) prior to Defendants obtaining their personal information;
(d) employees (and attorneys) of Defendants and members of their
immediate families; and (e) the presiding judge and anyone working in
the presiding judge's chambers and the members of their families.

1 *Id.* at 30. Defendants subsequently filed motions to reconsider class certification, to
2 certify the order on the Second Motion to Dismiss for interlocutory review, and
3 announced the intention to seek interlocutory review of class certification by the
4 Ninth Circuit under Rule 23(f), ECF No. 113, 115 at 3 n.1.

5 At the request of the parties, the case was stayed and referred to Hon. Lonny
6 Suko for mediation. ECF No. 117. Before mediation, Class Counsel requested,
7 obtained and reviewed a significant amount of financial materials from Defendants
8 in order to evaluate Defendants' ability to satisfy a potential judgment in this case.
9 Barton Decl. ¶ 7. As part of the review of those materials, Class Counsel hired an
10 economist to assist them in reviewing and understanding Defendants' financial
11 information. *Id.*.. The Parties exchanged pre-mediation settlement offers and then
12 attended an in-person mediation session on May 23, 2019 with Senior Judge Lonny
13 Suko. *Id.* ¶ 9. An agreement in principle was reached only at the end of the all-day
14 mediation session. *Id.* The parties then entered into the formal Settlement
15 Agreement.

16 **II. Terms of the Settlement**

17 The terms of the proposed settlement between Plaintiff and Defendants
18 provide both a monetary and non-monetary consideration. Agmt. §§ 4, 6. Under
19 the Settlement, effective as of the execution of the Settlement Agreement,
20 Defendants agree that they will refrain from purchasing PTCRs in or from the State

1 of Washington for the purpose of acquiring contact information for potential
2 clients and sending marketing materials to them. *Id.* § 6.1. Defendants also agree
3 that they will cease using any such PTCRs for those purposes, and will, within 120
4 days after the final distribution to the Class Members, destroy all such PTCRs and
5 personal information taken from them. *Id.* § 6.3-4. Defendants also agreed to notify
6 Class Counsel of any third parties to whom Defendants have provided such PTCRs
7 (or personal information from the PTCRs), and will notify such third parties that
8 Plaintiff and the Class consider those records to contain information protected by
9 the DPPA. *Id.* § 6.5-6

10 In addition to this non-monetary consideration, Defendants have agreed to
11 pay the following amounts: (1) \$950,000 into a Settlement Fund, which minus only
12 settlement administration expenses, will be paid to the Class (and which will be
13 fully funded by no later than June 1, 2020); and (2) between \$900,000 and \$1.05
14 million (depending on whether the amount is paid by December 1, 2020 or paid
15 over three years), out of which any award of attorneys' fees, litigation expenses
16 and class representative service award, and if there are any remaining amounts, the
17 remainder will be paid to the Settlement Fund.

18 The Net Settlement Fund will be paid to the Class Members pursuant to a
19 Plan of Allocation that proposes that Settlement Fund will be evenly divided
20 among all Class Members and that Class Members will receive a payment without
21

1 needing to complete a claim form. The benefit of being able to distribute the
2 Settlement Funds to Class Members is that it should greatly increase the number of
3 persons who actually benefit from the Settlement.

4 In exchange for these benefits, the Class will release and dismiss with
5 prejudice all claims arising out of Defendants' acquisition and use of PCTRs that
6 Defendants have identified as involving Class Members and will dismiss with
7 prejudice their claims asserted in this action. Defendants will likewise release
8 Plaintiff and each Class Member from all claims that could have been asserted in
9 this case, including any claims for attorneys' fees, costs, expenses, or sanctions,
10 that relate to the filing, commencement, prosecution, or settlement of this case.

11 **III. The Proposed Settlement Merits Preliminary Approval**

12 As a matter of public policy, settlement is a strongly favored method for
13 resolving disputes. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d
14 437, 443 (9th Cir. 1989). This is especially true in class actions. *Officers for*
15 *Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir.
16 1982); *Smith v. Legal Helpers Debt Resolution, LLC*, No. 11 CV 5054, 2012 WL
17 12863173, at *3 (W.D. Wash. Aug. 30, 2012) ("Strong judicial policy favors
18 settlements, particularly where complex class action litigation is concerned."). To
19 protect the interests of the class, Rule 23(e) provides that a class action cannot be
20 settled without court approval. Fed. R. Civ. P. 23(e). "At this stage of the

1 proceedings, the Court must initially consider whether to grant preliminary
2 approval of the settlement as a first step toward final approval.” *Hall v. L-3*
3 *Commc’ns Corp.*, No. 15 CV 231, 2019 WL 3845462, at *3 (E.D. Wash. Jan. 25,
4 2019).

5 The request for preliminary approval only requires an “initial evaluation” of
6 the fairness of the proposed settlement. *Manual for Complex Litigation* § 21.632
7 (4th ed. 2004). The purpose of preliminary approval is to determine “whether to
8 direct notice of the proposed settlement to the class, invite the class’s reaction, and
9 schedule a fairness hearing.” William B. Rubenstein *et al.*, *Newberg on Class*
10 *Actions* § 13:10 (5th ed. 2013). Because the approval is only preliminary, courts
11 generally undertake a limited review of the proposed settlement. *Id.* “The general
12 rule is that a court will grant preliminary approval where the proposed settlement is
13 neither illegal nor collusive and is within the range of possible approval.” *Id.* “In
14 granting preliminary approval, the Court considers whether the Settlement
15 Agreement appears to be the product of serious, informed, non-collusive
16 negotiations; has no obvious deficiencies; does not grant preferential treatment to
17 class representatives, and falls within the range of possible approval.” *Hall*, 2019
18 WL 3845462, at *3; *Scott v. United Servs. Auto. Ass’n*, No. 11 CV 1422, 2013 WL
19 12251170, at *1 (W.D. Wash. Jan. 7, 2013) (same); *Gabriel v. Nationwide Life Ins.*
20 Co., No. 09 CV 508, 2010 WL 11684279, at *6 (W.D. Wash. May 17, 2010)

1 (same). The Settlement readily satisfies the requirements for preliminary approval.

2 **A. The Settlement is a Result of Serious, Informed, and Non-**
3 **Collusive Negotiations**

4 “A presumption of fairness and adequacy attaches to a class action
5 settlement reached in arm’s-length negotiations by experienced class counsel after
6 meaningful discovery.” *Dunakin v. Quigley*, No. 14 CV 567, 2017 WL 123011, at
7 *2 (W.D. Wash. Jan. 10, 2017). The fact that experienced counsel has been
8 actively engaged in the litigation and has diligently pursued the necessary
9 discovery evidences the non-collusive nature of the settlement. *Rinky Dink, Inc. v.*
10 *World Bus. Lenders, LLC*, No. 14 CV 268, 2016 WL 4052588, at *5 (W.D. Wash.
11 Feb. 3, 2016) (“The presence of substantial formal discovery is an indicator that
12 the parties were informed regarding the wisdom of settlement and engaged in
13 arms-length bargaining.”). The assistance of a neutral mediator in the settlement
14 negotiations further evidences the non-collusive nature of the negotiations. *Zamora*
15 *Jordan v. Nationstar Mortg., LLC*, No. 14 CV 175, 2019 WL 1966112, at *3 (E.D.
16 Wash. May 2, 2019) (finding no collusion where “the Settlement Agreement was
17 achieved under the supervision of a trusted third-party mediator following
18 extensive settlement negotiations”); *Carideo v. Dell Inc.*, No. 06 CV 1772, 2010
19 WL 11530601, at *3 (W.D. Wash. Sept. 13, 2010) (“The assistance of an
20 experienced mediator … confirms that the settlement is non-collusive.”).

21 In this case, a settlement was not reached until Plaintiff’s counsel had
Plaintiff’s Motion for Preliminary Approval of Class Action Settlement - 12

1 conducted substantial discovery. Plaintiff's counsel did not only seek, obtain, and
2 review thousands of pages of documents and answers to interrogatories, but also
3 met and conferred with Defendants on numerous discovery matters and, ultimately,
4 twice moved to compel Defendants to provide futher responses to interrogatories.
5 Barton Decl. ¶ 3. Plaintiff's counsel also took the depositions of the Washington
6 Department of Licensing, the Washington State Patrol, the Washington State
7 Criminal Justice Training Commission, and the Spokane Police Department, and
8 defended the deposition of Ms. Wilcox. Barton Decl. ¶ 5.

9 The terms of the Settlement resulted from hard-fought negotiations. *Id.* ¶¶ 6-
10 13. The Parties negotiated the principal terms of the agreement in an in-person
11 mediation facilitated by Senior Judge Hon. Lonny Suko on May 23, 2019, in
12 Yakima, Washington. *Id.* ¶ 9. The Parties reached the principal terms of the
13 Settlement only after Plaintiff had received and reviewed documents produced by
14 Defendants regarding their financial circumstances and ability to satisfy a potential
15 judgment in this case. Barton Decl. ¶ 7. After reaching the principal terms of the
16 Settlement at the May 23 session, Plaintiff and Defendants spent additional time
17 crafting the detailed terms of a formal agreement and finalizing them in the
18 Settlement Agreement. Barton Decl. ¶ 11.

19 The opinion of experienced class action attorneys is to be considered on
20 preliminary approval. *See Burnett v. W. Customer Mgmt. Grp., LLC*, No. 10 CV
21 Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 13

1 56, 2011 WL 13290339, at *6 (E.D. Wash. Feb. 22, 2011). As previously
2 demonstrated on their Motion for Class Certification, Class Counsel are
3 experienced in class action litigation. Pl.’s Mot. for Class Cert. (ECF No. 61).
4 Class Counsel believe that the proposed Settlement is a very good result and that
5 they received sufficient discovery to reach that conclusion. Barton Decl. ¶¶ 3-5, 12.

6 Accordingly, as a product of extensive negotiations aided by a neutral
7 professional mediator and conducted by informed and experienced counsel over 26
8 months of hard-fought litigation, the Settlement Agreement is the product of
9 informed, vigorous, arms-length bargaining.

10 **B. The Settlement Provides Significant Benefits to the Class and
is Well Within the Range of Reasonableness**

11 While the Court’s ultimate assessment of whether the proposed settlement is
12 fair, reasonable, and adequate depends on many factors, at preliminary approval,
13 the Court must only be satisfied that the settlement “falls within the range of
14 *possible* approval” and has no “obvious deficiencies.” *Gabriel v. Nationwide Life*
15 *Ins. Co.*, No. 09 CV 508, 2010 WL 11684279, at *6 (W.D. Wash. May 17, 2010)
16 (emphasis added); *Rinky Dink, Inc. v. World Bus. Lenders, LLC*, No. 14 CV 268,
17 2016 WL 4052588, at *4 (W.D. Wash. Feb. 3, 2016) (“[A]t this preliminary
18 approval stage, the Court conducts a less searching inquiry of each factor and only
19 requires that the proposed settlement be within the range of final approval”). “To
20 determine whether a settlement amount falls within the range of reasonableness,
21 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement - 14

1 courts primarily consider plaintiffs' expected recovery balanced against the value
2 of the settlement offer." *Hall*, 2019 WL 3845462, at *4 (citations and quotation
3 marks removed). Here, the Settlement Agreement will provide for at least
4 \$950,000 to be paid into a Settlement Fund for the benefit of the Class, which
5 results in at least a per Class Member value of \$ 29.41 (before settlement
6 administration expenses) and \$26.34 (after payment of estimated settlement
7 administration expenses).¹ Agmt. § 4.1. The total amount is in line with class
8 settlements approved in DPPA cases by other courts. *E.g. Wiles v. Sw. Bill Tel.*
9 Co., No. 09 CV 4236, 2011 WL 2416291, at *1 (W.D. Mo. June 9, 2011) (finding
10 a \$900,000 settlement reasonable for a class of all drivers licensed in Missouri).
11 Particularly in light of the other factors, this Settlement is a very good result for the
12 Class.

13 First, the expense, risk, and length of continued proceedings necessary to
14 prosecute the litigation against Defendants through trial and appeals, including the
15 risk that the claim might fail on a motion for summary judgment, following a trial
16 on the merits, or on appeal, weighs in favor of settlement. Defendants filed
17

18 ¹ Defendants purchased 10,555 PTCRs between September 1, 2017 and June 23,
19 2017, of which 8,835 involved individuals who were not then – and never became
– clients of Swapp Law. ECF No. 61-7 at Nos. 2(a), (b) and (c). After reviewing
20 the data, eliminating duplicates, eliminating persons excluded from the Class,
Class Counsel estimates the Class to consist of approximately 32,300 individuals.
Barton Decl. ¶13. An express condition of the Settlement is that Defendants
21 purchased no more than 9,000 PCTRs during the Class Period. Agrmt. § 14.2.

1 motions for reconsideration and interlocutory appeal of this Court's order
2 certifying the Class, and stated the intention to pursue a petition to the Ninth
3 Circuit for review of the same under Rule 23(f). ECF No. 113, 115 at 3 n.1.

4 Second, the uncertainty introduced by the remedial provisions of the DPPA
5 weighs in favor of settlement. The DPPA provides that “[t]he court may award—
6 (1) actual damages, but not less than liquidated damages in the amount of \$2,500;
7 (2) punitive damages upon proof of willful or reckless disregard of the law; (3)
8 reasonable attorney's fees and other litigation costs reasonably incurred; and (4)
9 such other preliminary and equitable relief as the court determines to be
10 appropriate.” 18 U.S.C. § 2724(b). Some courts have taken the position that relief
11 is awarded “at the discretion of the district court,” and “statutory damages are not
12 mandatory recovery in a DPPA case.” *Fresco v. Auto. Directions, Inc.*, No. 03 CV
13 61063, 2009 WL 9054828, at *4 (S.D. Fla. Jan. 20, 2009) (holding proposed
14 DPPA settlement within range of potential recovery). In that case, the Class may
15 receive far less than the \$25 million and the jury may award far less than \$25
16 million or perhaps nothing at all.

17 Third, there is a substantial risk that even if the Class obtained a judgment
18 against Defendants, Defendants would not be able to satisfy the judgment. Barton
19 Decl. ¶ 8. In *Rinky Dink, Inc. v. World Bus. Lenders, LLC*, No. 14 CV 268, 2016
20 WL 4052588 (W.D. Wash. Feb. 3, 2016), the court recognized that prior to seeking
21 Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 16

1 preliminary approval, class counsel had reviewed detailed financial documents
2 establishing that defendants “d[id] not have the ability to pay a larger settlement,”
3 and held that “[t]his factor weighs in favor of preliminary approval.” *Id.* at *4.
4 Here, Defendants produced a substantial volume of financial records to allow Class
5 counsel to assess the financial position of the Defendants and their ability to satisfy
6 a judgment. Barton Decl. ¶ 7. Based on those records, Defendants do not have the
7 capacity to pay anything more than a fraction of the judgement. *Id.* ¶ 8. A
8 judgment of full damages for the Class would likely bankrupt Defendants and
9 require liquidation of the Defendants’ assets in court proceedings (further depleting
10 the funds available to satisfy the judgment and placing the Class in the position of
11 junior, unsecured creditors). *Id.*

12 Additionally, non-monetary relief in the form of changes to business
13 practices and the removal of protected information from the possession of
14 Defendants accomplishes the privacy purposes of the DPPA. *See Roberts v. Source*
15 *for Pub. Data, LP*, No. 08 CV 4167, 2010 WL 2195523, at *3 (W.D. Mo. May 28,
16 2010) (holding return and removal of DPPA-protected information alone, even
17 with no monetary component, constituted reasonable and satisfactory terms of
18 settlement). Under the terms of the Settlement, Defendants will be required to
19 destroy the PTCRs or other records in their possession containing the personal
20 information of Class Members and to cease and refrain from using that personal

1 information for any purpose. Agmt. § 6.2-4. Defendants are also required to notify
2 third parties to whom they have transmitted the personal information of Class
3 Members that the Class consider that information protected by the DPPA. Agmt. §
4 6.6. And Defendants will no longer purchase PCTRs in or from the State of
5 Washington for the purpose of soliciting clients. Agmt. § 6.1. Accordingly, both
6 the monetary and the non-monetary component of the Settlement are well within
7 the range of reasonableness.

8 The scope of the releases in a proposed settlement is acceptable where the
9 claims released are limited to those based upon the facts set forth in the complaint.
10 *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“A settlement agreement
11 may preclude a party from bringing a related claim in the future even though the
12 claim was not presented and might not have been presentable in the class action,
13 but only where the released claim is based on the identical factual predicate as that
14 underlying the claims in the settled class action”). Here, the Settlement only
15 releases claims based on allegations in the Amended Complaint. Agmt. § 12.2.

16 **C. The Settlement has No Obvious Deficiencies**

17 The final factor considered on preliminary approval is whether the
18 agreement has any obvious deficiencies, such as “unduly preferential treatment of
19 class representatives or of segments of the class, or excessive compensation of
20 attorneys.” *Scott v. United Servs. Auto. Ass'n*, No. 11 CV 1422, 2013 WL

1 12251170, at *1 (W.D. Wash. Jan. 7, 2013); *Newberg on Class Actions* § 11:25
2 (4th ed. 2010). The Ninth Circuit has advised courts to be concerned (a) “when
3 counsel receive a disproportionate distribution of the settlement, or when the class
4 receives no monetary distribution but class counsel are amply rewarded”; (b)
5 “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment
6 of attorneys' fees separate and apart from class funds, which carries ‘the potential
7 of enabling a defendant to pay class counsel excessive fees and costs in exchange
8 for counsel accepting an unfair settlement on behalf of the class’”; and (c) “when
9 the parties arrange for fees not awarded to revert to defendants rather than be
10 added to the class fund.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
11 947 (9th Cir. 2011). Such signs do not necessarily mean that a settlement is
12 improper, but only that it is supported by an explanation of why the fee is justified
13 and does not betray the class's interests. *Id.* at 949.

14 With respect to the first potential area of concern, the Class is to receive a
15 monetary distribution and counsel's distribution will not be disproportionate. The
16 Settlement Agreement provides for the prompt payment of equal amounts to Class
17 Members out of an \$950,000 Settlement Fund. Agmt. § 4.1. In light of the limits of
18 Defendants financial capacities, it was necessary in order to reach Settlement for
19 the monetary component of the Settlement to be paid over time. Barton Decl. ¶ 10.
20 The structure of the Settlement requires payment to the Class before Class Counsel
21 Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 19

1 will be paid. *Compare* Agmnt §§ 4.1, 10.3. Class Counsel agreed to allow fee and
2 expense amounts paid over time in order to accomplish the settlement and
3 negotiated the terms of fees and expenses only after agreement had been reached
4 on the underlying settlement for the Class. Barton Decl. ¶ 10. Class Counsel will
5 also only seek attorneys' fees calculated under the lodestar method. *Id.* Plaintiff
6 would have been entitled to attorneys' fees and expenses as a remedy if Plaintiff
7 prevailed at trial. *See* 18 U.S.C. § 2724(b) ("The Court may award... reasonable
8 attorneys fees and other litigation costs reasonably incurred...."); *Taylor v. City of*
9 *Amboy*, No. 14 CV 722, 2017 WL 4075163, at *1 (D. Minn. Sept. 14, 2017)
10 (applying lodestar method to award attorneys fees in DPPA case); *Fresco*, 2009
11 WL 9054828, at *8 (same).

12 While the Settlement Agreement does provide for payment of attorneys' fees
13 separate from class funds, this structure is appropriate in this case and does not
14 raise concerns that Plaintiff's counsel is accepting an unfair settlement on behalf of
15 the class. Paying the Class from the Settlement Fund and paying Plaintiff's counsel
16 from the later payments ensures both that the Class will be promptly paid and that
17 Class Counsel—not the Class—will bear the default risk for these later payments
18 by Defendants. In *Dennings v. Clearwire Corp.*, No. 10 CV 1859, 2013 WL
19 1858797, at *9 (W.D. Wash. May 3, 2013), *aff'd* No. 13-35491 (9th Cir. Sept. 9,
20 2013), the court held that there was no evidence of collusion despite the existence
21 Plaintiff's Motion for Preliminary Approval of Class Action Settlement - 20

1 of a “clear sailing” provision. *Id.* at 8. Specifically, the Court noted that the
2 negotiations had been conducted at arm’s length with the assistance of a mediator,
3 as here. *Id.* And the Court also held that where the “clear sailing” feature provides
4 any amounts not awarded will revert to the Class that there is no indication of
5 collusion. *Id.* at 9. Here the settlement likewise provides that any amount of these
6 later payments by Defendants that the Court does not award as attorneys fees will
7 revert to the Settlement Fund. Agmt § 4.2.

8 At this point, the question is merely whether the agreement is preliminarily
9 fair. In *Anderson-Butler v. Charming Charlie Inc.*, No. 14 CV 1921, 2015 WL
10 4599420 (E.D. Cal. July 29, 2015), proposed class settlement allowed plaintiff’s
11 counsel to apply for a fee award to be paid by the defendant separate and apart
12 from the recovery of the class, which defendant had agreed not to oppose. *Id.* at *2.
13 The court preliminarily approved the settlement, and declined to “evaluate the fee
14 award at length” in “considering whether the settlement is adequate,” because “[i]f
15 the court, in ruling on the fees motion, finds that the amount of the settlement
16 warrants a fee award at a rate lower than what plaintiff’s counsel requested” the
17 court had the power to reduce the award accordingly. *Id.* at 11. Likewise, here the
18 specific amounts of attorneys’ fees and any class representative incentive award
19 can be reserved on this preliminary approval motion to the final approval hearing
20 and the discretion of the Court.

1 No Class Member or group of Class Members will receive unduly favorable
2 treatment under the terms of the Settlement. The Plan of Allocation proposes that
3 the Settlement Fund will be equally divided among all Class Members. See Barton
4 Decl. Ex. C at ¶ 3. “[C]ourts recognize that an allocation formula need only have a
5 reasonable, rational basis, particularly if recommended by experienced and
6 competent counsel.” *Vinh Nguyen v. Radient Pharm. Corp.*, No. 11 CV 406, 2014
7 WL 1802293, at *5 (C.D. Cal. May 6, 2014) (internal quotation marks and
8 modifications omitted). Here the Plan of Allocation has a reasonable basis because
9 Class Members would each be entitled to seek liquidated damages in the amount of
10 \$2,500 in the event their respective claims succeeded on the merits. While Plaintiff
11 will be entitled to apply for an incentive award, the amount will be in the discretion
12 of the Court and will come from the funds marked for application for attorneys’
13 fees, not the Settlement Fund. Agmt. § 4.2.

14 **IV. The Notices and Plan of Notice Should be Approved**

15 Once the parties obtain preliminary approval of the settlement, Rule 23(e)
16 requires that the court to direct notice in a reasonable manner to all Class Members
17 who would be bound by the settlement. *Logan v. Hargraves*, No. 04 CV 214, 2008
18 WL 11425713, at *3 (E.D. Wash. Sept. 25, 2008). A proper notice should (1)
19 describe the facts underlying the action and the class, (2) describe the terms of the
20 settlement, (3) disclose any benefits provided to class representatives, (4) provide

1 information regarding attorney's fees, (5) state the time and place of the final
2 hearing, (6) provide counsel's contact information and instructions on how to
3 object and/or make inquiries, and (7) explain the procedure for allocation. *Manual*
4 *for Complex Litigation, supra*, § 21.312; *see Rosas v. Sarbanand Farms, LLC*, No.
5 18 CV 112, 2019 WL 859225, at *3 (W.D. Wash. Feb. 22, 2019) (approving notice
6 that provided such information); *Burnett v. W. Customer Mgmt. Grp., LLC*, No. 10
7 CV 56, 2011 WL 13290339, at *4 (E.D. Wash. Feb. 22, 2011) (same). Here, the
8 proposed notice to the Class provides information on all of these subjects and
9 informs Class Members about their rights under the Settlement as well as their
10 right to be heard at the final fairness hearing. See Barton Decl. Ex. B at 8.

11 For any class certified under Rule 23(b)(3), Rule 23(c)(3) requires that the
12 notice inform class members of the following: "(i) the nature of the action; (ii) the
13 definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a
14 class member may enter an appearance through an attorney if the member so
15 desires; (v) that the court will exclude from the class any member who requests
16 exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding
17 effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P.
18 23(c)(2)(B). Here, the proposed notice to the Class meets these requirements. See
19 Barton Decl. Ex. B at 1, 6-8. Thus the form of the proposed notice to the Class
20 should be approved.

1 “District courts possess broad discretion to shape such notice to comply with
 2 Rule 23.” *Rosas*, 2019 WL 859225, at *1; Fed. R. Civ. P. 23(e)(1)(B); *see* Fed. R.
 3 Civ. P. 23(c)(2)(B) (requiring “the best notice practicable under the
 4 circumstances”). It is well-established that notice sent by first class mail is
 5 sufficient when the names and addresses of the class members are known. *Eisen v.*
 6 *Carlisle & Jacqueline*, 417 U.S. 156, 173-77 (1974); *Peters v. Nat'l R.R. Passenger*
 7 *Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (“It is beyond dispute that notice by
 8 first class mail ordinarily satisfies rule 23(c)(2)'s requirement that class members
 9 receive ‘the best notice practicable under the circumstances.’”); *see Manual for*
 10 *Complex Litigation*, supra, § 21.311 (explaining that individual notice via mail is
 11 preferred when names and addresses are known). In such circumstances, courts
 12 have authorized notice only by mail. *See De La O v. Arnold-Williams*, No. 04 CV
 13 192, 2008 WL 11426817, at *5 (E.D. Wash. Aug. 12, 2008). Here, the members of
 14 the Class will receive notice by U.S. Mail. Agmt. § 3.3.² Thus, these procedures
 15 satisfy due process, meet the requirements of Rule 23, and should be approved.

16 Publication notice is not necessary in this case, because data identifies the
 17

18 ² Class Counsel has analyzed data produced by Defendants identifying the
 19 individuals appearing on PTCRs they purchased during the class period. Downes
 20 Decl. ¶ 4. By running searches over this data, Class Counsel has excluded entries
 21 that are duplicative, excluded from the class definition (e.g., business or
 government entities rather than individuals), or bear indicia that a driver's personal
 information was not sourced from a motor vehicle record (e.g., an address of
 “UNKNOWN”). Downes Decl. ¶ 5.

1 names and addresses of Class Members. Due to the nature of this case, many Class
2 Members are unlikely to know that Defendants possess their personal information,
3 ECF No. 85 at 27. Not only would publication notice be of minimal value in
4 alerting potential Class Members, but it would likely increase the costs of
5 administration and decrease the benefits available to pay Class Members.

6 Class Counsel has solicited bids for class notice and administration services
7 through a competitive process. Class Counsel solicited responses to a request for
8 proposals from six reputable service providers, of which four submitted bids.
9 Downes Decl. ¶ 2-3. Following extensive discussion with the respondents to ensure
10 an apples to apples comparison of services, Class Counsel has submitted the two
11 lowest priced bids for this Court's consideration. *See* Downes Decl. ¶ 7 and Exs. A
12 and B. The Court should appoint either RG/2 Claims Administration or Angeion
13 Group as the Settlement Administrator under the Settlement Agreement.

14 **V. The Court Should Establish Dates for Effectuating Final Approval
of the Settlement**

15 In order to send out an effective Notice, Plaintiff requests that the Court
16 establish the dates set forth in Plaintiff's motion.
17

CONCLUSION

18 For the forgoing reasons, the Court should grant Plaintiff's motion to
19 preliminarily approve the proposed Settlement, approve the proposed Class notice,
20 authorize its distribution to the Class, and set dates outlined above.
21

1 Dated: October 25, 2019

Respectfully submitted,

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29 *Attorneys for Plaintiff and the Class*

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019 I caused to be filed electronically a true copy of the foregoing document using the CM/ECF system which effected service of the same upon all counsel of record.

/s/ Thomas G. Jarrard

Thomas G. Jarrard